RHB Bank Bhd v Dato Lee Hock Soon & Anor

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COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-02–3132 OF 2010
ABU SAMAH, CLEMENT SKINNER AND AZIAH ALI JJCA
4 JULY 2013

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Contract — Guarantee — Terms of guarantee — Whether guarantee not only covered future debts but all monies owed by borrower on date guarantee was executed — Whether trial judge misconstrued intention of letter of offer and guarantee

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The appellant ('RHB') had sued the respondent as guarantors for the amount owing under various banking facilities it had granted to a company ('the borrower'). The High Court had dismissed RHB's claim giving rise to the instant appeal. RHB had initially granted the borrower an overdraft ('OD') facility of RM1.6m and a term loan ('TL') of RM3m. About four years later it granted the borrower a bank guarantee ('BG') facility for RM4m subject to the condition precedent that a letter of guarantee and indemnity ('the guarantee') was furnished by the borrower. The guarantee was provided by the respondents and another party. The BG though disbursed, was not utilised and it subsequently expired and was returned to RHB. Following the borrower's default in repaying the OD and TL facilities RHB terminated the facilities and claimed for all monies outstanding thereunder. The respondents denied any liability under those facilities claiming they had only guaranteed the BG facility for RM4m and that as the BG itself was not crystallised, their liability under that facility also did not arise. The High Court held that the guarantee was only given for the BG facility and that it did not cover the OD and TL facilities. In its instant appeal RHB argued that the words used in the guarantee showed that it was not limited to the BG facility alone but was in respect of all monies the borrower owed to RHB on any account whatsoever as at, and commencing from, the date the guarantee was signed by the respondents.

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Held, allowing the appeal, setting aside the decision of the High Court and entering judgment against the first and second respondents:

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(1) Irrespective of the purpose for which the banking facility was granted, the guarantee expressly provided that the respondents jointly and severally guaranteed that they would pay on demand to RHB not just monies that were due and owing by the borrower subsequent to the date of execution of the guarantee but also monies 'which now are' due to RHB. There was clearly an intention that the guarantee was not to be confined to the additional banking facility but also applied to monies then outstanding and due to RHB (see para 14).

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(2) The trial judge correctly found that the words in the guarantee covered the TL and OD facilities then existing but that they were displaced by the purpose for which the guarantee was given, being the BG of RM4m. The trial judge had misconstrued the intention of the letter of offer and the guarantee and had not sufficiently considered the surrounding circumstances (see paras 14 & 12).

(3) At the time the guarantee was executed the borrower was in default of TL amounting to RM1m and OD amounting to RM1.6m. Judgment had been obtained against the borrower. Therefore under the guarantee the respondents were liable to pay the said sums to RHB (see para 14).

[Bahasa Malaysia summary

Perayu ('RHB') telah menyaman responden sebagai penjamin untuk jumlah yang dihutang di bawah pelbagai kemudahan perbankan yang diberikannya kepada syarikat ('peminjam'). Mahkamah Tinggi telah menolak tuntutan RHB dengan itu membangkitkan rayuan ini. RHB pada mulanya memberikan peminjam kemudahan overdraf ('OD') sebanyak RM1.6 juta dan pinjaman berjangka ('PB') sebanyak RM3 juta. Lebih kurang empat tahun kemudiannya ia memberikan peminjam kemudahan jaminan bank ('JB') untuk RM4 juta tertakluk kepada syarat terdahulu bahawa surat jaminan dan indemniti ('jaminan') dikemukakan oleh peminjam. Jaminan tersebut diberikan oleh responden dan pihak lain. JB walaupun telah dibayar, tidak digunakan dan ia kemudiannya tamat dan dikembalikan kepada RHB. Berikutan kegagalan peminjam dalam membayar balik kemudahan OD dan PB, RHB menamatkan kemudahan-kemudahan tersebut dan menuntut untuk kesemua jumlah terhutang di bawahnya. Responden-responden menafikan apa-apa liabiliti di bawah kemudahan-kemudahan tersebut mendakwa mereka hanya menjamin kemudahan JB untuk RM4 juta dan bahawa memandangkan JB itu sendiri bukan jelas, liabiliti mereka di bawah kemudahan tersebut juga tidak berbangkit. Mahkamah Tinggi memutuskan bahawa jaminan tersebut hanya diberikan untuk kemudahan JB dan ia tidak melitupi kemudahan OD dan PB. Dalam rayuan ini RHB berhujah bahawa perkataan-perkataan yang digunakan di dalam jaminan menunjukkan bahawa ia tidak terhad kepada kemudahan JB semata-mata tetapi berkaitan kesemua jumlah wang yang peminjam berhutang dengan RHB atas apa-apa akaun pada, dan bermula daripada, tarikh jaminan ditandatangan oleh responden-responden.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memasukkan penghakiman terhadap pertama dan kedua responden:

(1) Tanpa mengira tujuan untuk mengapa kemudahan perbankan diberikan, jaminan tersebut secara nyata memperuntukkan bahawa responden-responden bersesama dan berasingan menjamin yang mereka akan membayar atas tuntutan kepada RHB bukan sahaja wang yang kena

dibayar oleh peminjam selepas tarikh pelaksanaan jaminan tersebut tetapi juga wang 'which now are' yang kena bayar kepada RHB. Jelas terdapat niat bahawa jaminan tidak dihadkan kepada kemudahan kewangan tambahan tetapi juga digunapakai kepada wang yang belum dijelaskan dan kena bayar kepada RHB (lihat perenggan 14).

(2) Hakim perbicaraan secara betul mendapati bahawa perkataan-perkataan di dalam jaminan meliputi kemudahan-kemudahan PB dan OD yang wujud ketika itu tetapi ia diganti bagi tujuan yang mana jaminan tersebut diberi, sebagai JB sebanyak RM4 juta. Hakim perbikaraan telah salah tafsir niat surat tawaran dan jaminan tersebut tidak mempertimbangkan dengan secukupnya keadaan sekeliling (lihat perenggan 14 & 12).

(3) Pada masa jaminan tersebut dilaksanakan peminjam gagal membayar PB berjumlah sebanyak RM1 juta dan OD berjumlah RM1.6 juta. Penghakiman telah diperolehi terhadap peminjam. Oleh itu di bawah jaminan tersebut responden-responden bertanggungjawab membayar jumlah tersebut kepada RHB (lihat perenggan 14).]

Notes

For a case on terms of guarantee, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5153.

Cases referred to

Heng Cheng Swee v Bangkok Bank Ltd [1976] 1 MLJ 267; [1979] 1 LNS 179, FC (refd)

Appeal from: Civil Suit No 22–47 of 2008(II) (High Court, Kuching)

Chan Siew Yan (Ee & Lim Advocates) for the appellant.
Lim Heng Choo (Lim & Lim Advocates) for the respondents.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant (the plaintiff in the court below), a bank incorporated in Malaysia, instituted an action against the first defendant, Sierra Estates Sdn Bhd as borrower and against the second, third and fourth defendants as guarantors for the repayment of banking facilities. The banking facilities were granted on the application of the first defendant for the construction and completion of a housing project in Labuan ('the project'). Judgment had been entered earlier against the first and fourth defendants. The trial before the learned judge was confined to determining the liability of the second and third defendants (the first and second respondents in this appeal). The learned judge dismissed the appellant's claim hence the appeal before us. Having considered the appeal records and the submissions of learned counsel for the appellant and

the first and second respondents, we allowed the appeal and set aside the judgment of the High Court. We entered judgment against the first and second respondents in terms of para 12(i)–(ii) of the statement of claim. We now give our reasons for our decision. For the purpose of this judgment parties will be referred to as they were in the court below.

SALIENT FACTS

[2] The salient facts derived from the appeal records showed that on 23 May 1998 the plaintiff had approved banking facilities to the first defendant for a total sum of RM11m which included an overdraft for RM1.6m and a term loan ('TLI') of RM3m (pp 65–71 of the appeal record Vol 2 PtC(1)). There were four individual guarantors one of whom was the third defendant. The corporate guarantor was the fourth defendant (see pp 72–71 of the appeal record Vol 2 PtC(1)).

[3] By letter dated 29 October 2002 the plaintiff granted additional banking facilities to the first defendant in the form of a bank guarantee ('BG') and a term loan II ('TLII') for a total sum of RM4m. The BG was to be issued to the contractor as payment guarantee which upon crystallisation would be converted to TLII (p 202 of the appeal record Vol 2 PtC(1a)). One of the conditions precedent to the offer was that the borrower shall furnish a letter of guarantee and indemnity. On 5 August 2003 the second and third defendants executed a letter of guarantee and indemnity by which in consideration of the plaintiff agreeing to continue to make advances loans or to give credit or accommodation to the first defendant, the second and third defendants jointly and severally agreed and guaranteed, inter alia, to pay to the plaintiff on demand all sums of money which were then or at any time or times thereafter may become due or owing or may become accruing or becoming due to the plaintiff or remain unpaid on the general balance of the first defendant's account with the plaintiff anywhere and on any account whatsoever (pp 246–254 of the appeal record vol 2 PtC(1a)). It was expressly provided that the total sum for principal recoverable from the guarantors shall not exceed RM4m. It was further provided that all accumulated and capitalised interest shall be deemed interest and not principal for the purpose of ascertaining whether the limit of principal sum of RM4m had been exceeded or not. This letter of guarantee and indemnity was then replaced by a supplemental guarantee and indemnity also dated 5 August 2003 executed by the second and third defendants giving a guarantee and indemnity in the same terms as earlier given.

[4] On 7 June 2005 the first defendant entered into an agreement with one Messrs L&T Construction for the supply of labour and material to complete all outstanding works. Under this agreement the first defendant was obliged to

provide a payment guarantee as security for payment. Pursuant to the said agreement on 30 June 2005 the plaintiff issued a payment guarantee ('the BG') limited to RM4m to Messrs L&T Construction (pp 370–371 of the appeal record Vol 2 PtC(2)). The BG though disbursed was not utilised and it subsequently expired. It was then returned to the plaintiff (pp 391 and 409 of the appeal record vol 2 PtC(2)).

[5] The plaintiff claims that the first defendant had defaulted in repayment of the OD and TL facilities and had abandoned or failed to continue and complete the project and despite repeated demands had failed to and continued to fail to regularise the outstanding OD and TL accounts. By letter dated 12 June 2007 to the first defendant, the OD and TL accounts were terminated and the plaintiff recalled all monies outstanding and due to the plaintiff. A letter of demand was sent to the first defendant to pay the outstanding sum with interest, additional interest and all other monies due and owing from 30 May 2007 until final payment. Copies of the letter of termination and recall of the OD and TL facilities were sent to the second and third defendants as guarantors. Separate letters of demand dated 12 June 2007 were also sent to the second and third defendants to repay the outstanding accounts in accordance with the guarantees and indemnities. Despite demands made to each of the defendants, the plaintiff states that the defendants failed to pay the outstanding OD and TL accounts. The plaintiff thereupon instituted an action and claimed against the first defendant as borrower and against the second, third and fourth defendants as guarantors the sum of RM2,844,880.67 due as at 14 March 2008, interest thereon and costs.

[6] In their statement of defence the second and third defendants denied the plaintiff's claim that the first defendant had defaulted in the OD and TL facilities. Both the defendants admitted only that the first defendant had an OD facility for RM1.6m and a TL facility of RM1m. The second defendant denied that he was a guarantor of the OD and TL facilities whilst the third defendant stated that his personal guarantee was replaced by the corporate guarantee given by the fourth defendant and therefore the third defendant was no longer guarantor to the OD and TL facilities.

[7] The second and third defendants admitted that they were guarantors to the BG for RM4m. However they averred that the BG was not utilised and there was no drawdown of the BG facilities. Therefore the second and third defendants averred that the BG never crystallised. The plaintiff however disagreed and by letter stated that the RM4m had been fully disbursed but since the BG had expired the plaintiff requested for the return of the BG for cancellation (p 409 of the appeal record Vol 2 PtC(2)).

DECISION OF THE HIGH COURT

[8] In his grounds of judgment the learned trial judge confined the issue to whether the letter of guarantee and indemnity dated 5 August 2003 made by the second and third defendants made them liable to the plaintiff for the outstanding sums claimed under the OD and TL facilities due from the first defendant. His Lordship found that the condition precedent relied on by the plaintiff was omitted by the plaintiff from the nine conditions precedent specifically set out in its letter of offer dated 29 October 2002. His Lordship agreed however that the all-encompassing words in the letter of guarantee and indemnity would perceptibly cover the term loan and the overdraft facilities but found that they were displaced by the purpose for which the letter of guarantee and indemnity was given, which was a BG of RM4m. Therefore according to His Lordship this would exclude the then existing term loan facility of RM1m and the overdraft facility of RM1.6m. His Lordship concluded that the letter of guarantee and indemnity did not cover the OD and TL facilities but was limited to the additional banking facility of RM4m.

THE APPEAL

[9] Before us learned counsel for the appellant stated that the appellant limited its claim to RM4m. Learned counsel conceded that the BG dated 30 June 2005 issued by the appellant to Messrs L&T Construction was returned and cancelled by the appellant a year later. Therefore the BG did not crystallise. However it was submitted that the words of the guarantee and indemnity showed that the guarantee and indemnity was not limited to the additional facility of RM4m but it also applied to monies outstanding and due to the appellant as at 5 August 2003. Learned counsel for the first and second respondents on the other hand submitted that the guarantee and indemnity was given for the additional banking facility which was never used and did not crystallise. Since there was no default therefore it was submitted that the guarantors were not liable. Thus the plaintiff ought not to impose liability on the first and second respondents. Learned counsel submitted that the appellant ought to pursue its claim against the existing guarantors for the existing liabilities of RM1.6m and RM1m and not against the first and second respondents.

[10] We have perused the letter of offer dated 29 October 2002. We find that one of the conditions precedent imposed by the appellant was the requirement that the borrower provide a duly executed and stamped letter of guarantee and indemnity (see p 203 of the appeal record Vol 2 PtC(1a)). It was in compliance with this requirement that the first and second respondents executed the letter of guarantee and indemnity dated 5 August 2003 which formed the basis of the appellant's claim.

[11] We noted that the preamble to the letter of guarantee and indemnity clearly stated that the first and second respondents jointly and severally agreed that, in consideration of the appellant 'opening or continuing an account with and making or continuing to make advances loans or otherwise giving credit or continuing to give credit or accommodation or granting forbearance' to the borrower, the first and second respondents guaranteed to pay to the appellant on demand 'all sums of money *which now are* or at any time or times hereafter during the operation of this Guarantee and Indemnity may become due or owing or may be accruing or becoming due' to the appellant by the borrower or remain unpaid on the general balance of the borrower's account.

[12] The learned trial judge had found that these words would perceptibly cover the term loan and the overdraft facilities but were however displaced by the purpose for which the letter of guarantee and indemnity was given, which was the BG of RM4m. Therefore according to His Lordship the letter of guarantee and indemnity excluded the then existing term loan facility of RM1m and the overdraft facility of RM1.6m. With respect we were unable to agree with the learned judge. In our considered opinion the learned judge had misconstrued the intention of the letter of offer and the letter of guarantee and indemnity and had not sufficiently considered the surrounding circumstances. In the case of *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267; [1979] 1 LNS 179 cited by the learned judge, the plaintiff bank claimed for the recovery of the sum of $75,000 with interest and costs based on a contract of guarantee executed by the defendant. The Federal Court said, inter alia, as follows:

> The issue between the parties here must surely rest on the construction to be placed on the words of the guarantee in question. The principles to be applied in construing a document of this kind are re-stated in *Tan Chong & Sons Motor Co Ltd v Yang Chin Lang* [1967] 1 MLJ 125 following *Lloyd's v Harper* (1880) 16 Ch D 290 at p 303 and that is that 'a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances'.

[13] The letter of guarantee and indemnity herein must therefore be considered together with the letter of offer and the surrounding circumstances. The letter of offer was obviously issued upon an application made by the borrower for additional banking facilities. The appellant approved the application subject to conditions precedent being fulfilled one of which was the provision of a letter of guarantee and indemnity. It was in compliance of this condition precedent that the first and second respondents executed the letter of guarantee and indemnity.

[14] Having perused the letter of guarantee and indemnity we find that the learned judge had correctly found that the words in the letter of guarantee and

indemnity covered the term loan and the overdraft facilities then existing. However we departed from the learned judge's finding that the purpose for which the banking facility was granted rendered the words in the said letter of guarantee and indemnity inconsequential and the first and second respondents were only liable for the additional banking facility of RM4m. In our considered view irrespective of the purpose for which the banking facility was granted, the letter of guarantee and indemnity expressly provided that the first and second respondents jointly and severally guaranteed that they would pay on demand to the appellant not just monies that may be due and owing by the borrower to the appellant subsequent to the date of execution of the said letter of guarantee and indemnity but also monies *'which now are'* due to the appellant. Thus there was clearly an intention that the letter of guarantee and indemnity was not to be confined only to the additional banking facility but would apply also to monies then outstanding and due to the appellant. It was not disputed that at the time the letter of guarantee and indemnity was executed the borrower was in default of TLI amounting to RM1m and the OD amounting to RM1.6m. Judgment had been obtained against the borrower. Therefore under the letter of guarantee and indemnity the first and second respondents were liable to pay the said sums to the appellant. For the reasons stated above we allowed the appeal and set aside the decision of the High Court and entered judgment against the first and second respondents in terms as prayed for in para 12(i)–(ii) of the statement of claim. Legal fees on a solicitor and client basis as prayed for in para 12(iii) was also allowed. We awarded costs of RM20,000 here and below to the appellant. The deposit was refunded.

Appeal allowed, decision of the High Court set aside and judgment entered against first and second respondents.

Reported by Ashok Kumar